IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-527

COURIER-NEWSOM EXPRESS, INC.,

Petitioner,

vs.

MARTIN IMPORTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOEL H. STEINER
39 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:
AXELROD, GOODMAN, STEINER
& BAZELON
39 South LaSalle Street
Chicago, Illinois 60603
312/236-9375

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Petitioner, Courier-Newsom Express, Inc., respectfully prays that a Writ of Certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 30, 1978.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Seventh Circuit entered June 30, 1978 (A-4) is intended to be a reported decision but as of this writing has not yet been published. The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division (A-15) is unreported.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on June 30, 1978 (A-4). This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. May a common carrier which transports a shipment of freight within the period of time usually required to transport such a shipment, when the occurrence of a holiday intervenes between the time of pickup and the time of delivery of said shipment, which does not advise the consignor or the consignee of said shipment of the occurrence of a holiday, be found to have negligently and unreasonably delayed the shipment?

2. May a common carrier be found negligent for failing to provide a type of transportation service for which there exists no applicable tariff provision.

STATUTE INVOLVED

This case involves the Carmack Amendment to the Interstate Commerce Act, Title 49 U. S. C. § 20(11), Volume 10, pages 11903-11904 (1970 edition). (A-1)

STATEMENT OF THE CASE

This case involves damage to an interstate shipment of freight consisting of 250 cases of wine, tendered to petitioner at Chicago, Illinois at approximately 4:30 p.m. on December 23, 1974, for transportation to Rockford, Illinois. Jurisdiction of the District Court was invoked pursuant to 49 U. S. C. § 20(11) and 28 U. S. C. § 1337.

The involved shipment of wine was loaded onto petitioner's unheated truck-trailer, which returned to respondent's terminal

between 6:15 and 6:30 p.m. on the evening of December 23rd. The shipment remained at petitioner's terminal until approximately 2:00 a.m. on the morning of December 24th, when the trailer was picked up by another driver and taken to Rockford, Illinois, a distance of some 87 miles. The trailer arrived at Rockford at approximately 5:00 a.m., no other freight was on the trailer.

Petitioner's driver dropped the trailer off at its Rockford terminal, which was closed. There were no employees present at the terminal at that time. Pursuant to petitioner's collective bargaining agreement with the Teamsters Union both December 24th and 25th were holiday days. Similarly, the consignee's place of business was closed on both December 24th and December 25th, 1974. There was no one present to receive the subject shipment because all of the consignee's employees were parties to a collective bargaining agreement with similar provisions. No attempt was made to notify the consignee of the arrival of the shipment on December 24th or December 25th.

The trailer remained in the terminal yard until the morning of December 26th. During that period of time the temperatures in Rockford ranged from 6° to 35° Fahrenheit. The shipment was tendered for delivery to the consignee on December 26. At that time the consignee refused to accept delivery because the wine had frozen, and after freezing wine has little value.

Following the submission of evidence and oral arguments, the District Court ruled from the bench that respondent had made a prima facie case in establishing that the wine was delivered to petitioner in good condition and was in damaged condition when tendered for delivery to the consignee. The District Court further found that although petitioner had sustained its burden of demonstrating that it was free from negligence, it had not carried its additional burden of demonstrating that the damage was occasioned by an inherent vice or the nature of the goods, and on March 16, 1977 entered judgment in favor of respondent. On August 1, 1977, the District Court granted

petitioner's motion to alter and amend the Court's findings and judgment and found that there was no unreasonable delay in making delivery and reaffirmed its prior Oral Decision that petitioner had not been negligent in its handling of the shipment of wine. The District Court further concluded that the temperatures which would cause wine to freeze are not matters of common knowledge and that the damage to the wine occurred solely due to its inherent nature. The District Court then held that petitioner had carried its burden and demonstrated that the damage was due to one of the excepted causes, relieving it of liability.

The Court of Appeals reversed the District Court's finding that petitioner was free from negligence, stating:

> "The parties stipulated that the 'usual transit time from Chicago to Rockford . . . is next morning or second day delivery'. Appellee's district and terminal manager testified that normally shipments from Chicago to Rockford are delivered the day after tender, except for days preceeding holidays and on Fridays. In 1974, December 25th fell on Wednesday. Had the shipment been tendered on Tuesday, the 24th, appellant could not have anticipated delivery until the 26th. We perceive no reason, however, from the evidence presented, why appellant could not reasonably have anticipated delivery on December 24th of the shipment tendered on Monday, the 23rd.
>
> * * * while the delay in delivery of the wine arguably may have been reasonable, the failure to advise the shipper in advance of the abnormally long delivery time was not." (A-7, 8.)

The Court of Appeals went on to state:

> "Our conclusion that the appellee was negligent is butressed by the express provision in appellee's tariffs for carriage of wine, which was paid by the appellant. By this tariff, appellee, in effect, held itself out as capable of transporting wine. Although appellee insists that it would have been illegal for it to provide heated carriage, and it did not know that wine would freeze, its tariff indicated that it had the knowledge and the facilities to properly and adequately transport that commodity. This would include knowledge that wine will freeze if exposed for several days to sub-freezing temperatures." (A-9.)

The Court of Appeals concluded that petitioner was negligent both in failing to advise respondent that the wine would not be delivered until December 26th and in its handling of the shipment of wine. The Court expressly failed to reach the issue as to whether or not the District Court erred in its holding that the damage was due solely to the inherent nature of the wine. (A-10, footnote 5).

The Court of Appeal's findings that petitioner was negligent in its handling of the subject shipment of wine are contrary to, and unsupported by the evidence as found by the District Court and conflict with numerous decisions of this Court, the Seventh Circuit itself and numerous other Courts of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Not Based Upon or Supported by the Evidence Adduced in the District Court.

The Court of Appeals concluded that there was a delay in the delivery of the subject shipment of wine of 48 hours in excess of the normal transit schedule and that petitioner was negligent in failing to advise respondent that the shipment could not be delivered until two full days after the normal time of delivery. (A-10) Such conclusions are not supported by the evidence adduced at trial.

The record reflects that Mr. O'Hearn, petitioner's Chicago terminal and division manager, the individual charged with supervision of both the Rockford and Chicago terminals, testified that the subject shipment was dispatched from Chicago to Rockford in the early morning hours of December 24, 1974, after having been picked up in the afternoon of December 23, 1974. He further testified that the shipment would have arrived

at petitioner's Rockford terminal at approximately 5:00 a.m. on the morning of December 24th.

It is undisputed that pursuant to the collective bargaining agreement between petitioner and the Teamsters Union, December 24th and 25th, 1974 were holidays and this resulted in the complete shut-down of petitioner's Rockford terminal on those dates. Similarly, the employees of the consignee of the subject shipment were members of the Teamsters Union and had a contract pursuant to which December 24th and 25th, 1974 were holidays insofar as the consignee's business was concerned. The consignee's place of business was also closed on December 24th and 25th and there was no one there on December 24th or 25th to receive the subject shipment (A-22, 23).

The Court of Appeals notes in footnote 1 of its Opinion (A-8), that:

> "The record reveals that the consignee was a small family-run business. It cannot of course be determined whether it could have been reached on December 24th. The crucial facts, however, are (1) appellee's acceptance of the shipment without advising appellant it would not be delivered until December 26 and (2) appellee's failure to attempt notification. In fact, appellee did not know that the consignee was not open on December 24 until the trial, when the consignee's Vice President testified to that fact."

There is no evidence in the record to support any such conclusions by the Court of Appeals. There is no testimony or evidence of any nature as to the size or nature of the business conducted by the consignee nor is there any indication in the record as to any knowledge possessed by petitioner as to whether or not the consignee's place of business was open on December 24th. All of this is sheer speculation by the Court of Appeals based upon arguments made by respondent's counsel.

The record was quite clear on what was the usual and customary transit time encountered on shipments handled by Courier-Newsom from Chicago to Rockford. The transit time

encountered was specifically dependent upon the day of the week in which the shipment was tendered to Courier-Newsom. On week days, Monday through Thursday, shipments picked up one day in Chicago will be delivered in Rockford on the next day. However, shipments picked up on Friday will not be delivered until Monday because Courier-Newsom's Rockford terminal is closed on Saturdays and Sundays. The same situation exists in the case of a holiday. A shipment tendered to Courier-Newsom the day before a holiday at Chicago will be delivered to the consignee in Rockford the day after the holiday. In the instant case what occurred was two intervening holiday days rather than two weekend days. Based upon his 31 years of uninterrupted experience in the transportation industry, Courier-Newsom's district manager, Mr. O'Hearn, was of the opinion that no delay was encountered or involved in the handling of the subject shipment (A-21). Mr. O'Hearn's testimony was unrebutted by respondent.

The Court of Appeals, in concluding that there was a two day delay in the delivery of the subject shipment has completely ignored the occurrence of the two intervening holiday days between the date upon which the subject shipment was tendered to petitioner by respondent at Chicago and the day upon which the shipment was offered for delivery to the consignee at Rockford. The Court of Appeals in so concluding, has completely ignored its own decision in *Shipper's Service Company* v. *Norfolk and Western Ry. Co.*, 528 F. 2d 56 (7th Cir., 1976), wherein that Court found that common carriers are only bound to transport property with "reasonable dispatch". In *Shipper's Service, id.*, p. 59, the Court of Appeals stated:

> "We adhere to our holding in *Peter Condakes Co., Inc.* v. *Southern Pacific Co., supra,* that a railroad's own schedules constitute prima facie evidence of the obligation imposed by Section 2(a) of the Bill of Lading to transport 'with reasonable dispatch'. It therefore follows that to make out a prima facie case of a breach of this duty, the plaintiff need prove timely delivery of the goods to the carrier,

the scheduled time of arrival and the fact of delay. See *Missouri Pacific R. Co.* v. *Elmore & Stahl*, 377 U. S. 134, 138, 84 S. Ct. 1142, 12 L. Ed. 2d 194; *Fraiser-Smith Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 435 F. 2d 1936, 1938 (7th Cir., 1971). Upon demonstrating these three elements of the case, the burden shifts to the railroad to adduce evidence that the delays were justified or reasonable under the circumstances."

While a motor common carrier such as petitioner does not have regular schedules in the same fashion that a railroad does, it is readily apparent that the subject shipment was transported within the time frame in which like shipments are usually and customarily transported from Chicago to Rockford. To establish a prima facie case it was necessary for respondent to show some deviation from petitioner's established schedules. It did not do so.

Since all of the evidence reflects that the subject shipment was transported within the schedules maintained by petitioner, it was plain error on the part of the Court of Appeals to find that there was any delay at all involved in petitioner's handling of the subject shipment, let alone a negligent or unreasonable delay.

Even if it could be found that the shipment was delayed in its transportation from Chicago to Rockford, surely the delay cannot be found to be an unreasonable one and the evidence presented excuses such a delay, as the shipment would have moved with no greater dispatch if tendered to petitioner at Chicago on a Friday or the day before any other holiday. Further, the Court of Appeals has lost sight of the fact that the consignee of the shipment was unable to receive it on December 24th or December 25th, 1974. If Petitioner's driver had dropped the trailer in front of the consignee's door on the morning of December 24th or gone to the door and attempted to make delivery, the end result would have been the same. The shipment would have sat otuside until the morning of December 26th, and it would have frozen because of its natural tendency to do so.

In the face of such evidence it was plain error for the Court of Appeals to reverse the District Court and find that petitioner had negligently delayed the shipment.

The Court of Appeals stated that it could perceive no reason why the consignor could not reasonably have anticipated delivery of the shipment on December 24th and that while the delay in the delivery of the shipment arguably may have been reasonable, the failure to advise the consignor in advance of the abnormally long delivery time was not (A-7, 8). This ignores several important factors. First of all, a carrier is not bound to transport a shipment within such a time period as a shipper may anticipate or even specifically request, but only to transport that shipment within a reasonable time. See: *Goliger Trading Co.* v. *Chicago & N. W. Ry. Co.*, 184 F. 2d 876, 880 (7th Cir., 1950). Moreover, since it has been amply demonstrated that petitioner did not delay, let alone unreasonably delay, the subject shipment it is most unreasonable that petitioner could be found negligent for failing to communicate the fact of a non-existent delay to the shipper. Apparently, what the Court of Appeals has done is conclude that petitioner was negligent not because the subject shipment was delayed, but rather, because the shipment was not transported within the time frame in which the Court, independent of the record, has concluded the shipper might have anticipated it would be delivered in. A finding that petitioner was negligent can only be based upon a finding that petitioner failed to transport the subject shipment with reasonable dispatch, which is contrary to all of the evidence.

II. The Decision Below Conflicts with the Decisions of the Supreme Court, Other Courts of Appeals and Those of the Seventh Circuit Itself, Which Hold That a Common Carrier May Not Render Any Service Not Provided for in Its Tariffs and May Not Be Found Negligent for Failing to Provide Such a Service.

The District Court based its conclusion that petitioner was not negligent in its handling of the subject shipment upon findings that petitioner kept the wine under cover, delivered it timely and that in view of the fact that petitioner's tariffs did not permit the rendering of heated cartage, it was not negligent in failing to provide such a service. (A-16).

Although acknowledging that petitioner's tariffs did not provide for heated carriage and that tariff provisions must be strictly adhered to, the Court of Appeals completely ignored the impact that such findings must have upon the outcome of this case and any determination that petitioner was negligent in its handling of the subject shipment of wine.

The Court of Appeals stated that its conclusion that petitioner was negligent is buttressed by expressed provision in petitioner's tariffs for the carriage of wine and that by its tariff petitioner in effect held itself out as capable of transporting wine. (A-9, 10). The Court stated:

> "Although appellee insists that it would have been illegal for it to provide heated carriage, and it did not know that wine would freeze, its tariff indicated that it had the knowledge and facilities to properly and adequately transport that commodity. This would include knowledge that wine will freeze if exposed for several days to subfreezing temperatures."

The Court of Appeals concluded that petitioner was negligent because it failed in its duty to provide safe and adequate equipment and facilities for the transportation of wine which it voluntarily accepted for transportation. Apparently, notwithstanding the absence of any tariff provisions providing for the rendering of heated carriage, the Court of Appeals has determined that petitioner was negligent for failing to provide such service. Such a conclusion completely ignores numerous decisions of this Court, decisions of the Seventh Circuit itself and decisions of other Courts of Appeals.

It is well established that the common carrier cannot be held liable for damage which occurs to a shipment due to the carrier's failure to furnish a type of transportation service which is not contemplated in the published rates and tariffs of that carrier. One of the earliest discussions of this type of an occurrence is set forth in *Chicago and Alton R. R.* v. *Kirby*, 225 U. S. 155, 56 L. Ed. 1033 (1912). In that case the defendant railroad agreed and guaranteed to transport the plaintiff's shipment in such a manner as to enable it to arrive at a connecting railroad at a certain time, in order that the shipment could be placed on a special train of the connecting line, all of which would enable the shipper to have its goods at a market in time for a special sale. The defendant railroad in *Chicago and Alton R. R.* v. *Kirby, id.* failed to meet its promise, and, as a result of the involved delay, the shipper lost profits on the sale of its goods. The Court noted that the published tariff rates of the defendant railroad did not provide for the furnishing of a expedited service or transportation by any particular train, and that the shipper was not required to pay a higher rate for the promised special service. The Court stated, at 225 U. S. 165:

> "Any advantage accorded by special agreement which affects the value of the service to the shipper and its costs to the carrier should be published in tariffs; and for breach of such a contract, relief will be denied, because its allowance without such a publication is a violation of the Act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation."

In *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, 67 L. Ed. 183 (1922), an anti-trust case in which the plaintiff was attacking the legality and validity of the rates of a rail carrier,

which had been previously approved by the Interstate Commerce Commission and were the published tariff rates of that carrier, this Court stated at 250 U. S. 163:

> "The legal rights of a shipper as against a carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this is the rate made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff cannot be varied or enlarged either by contract or tort of the carrier. (citing numerous authorities) . . . .
>
> This stringent rule prevails because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated."

This issue was again presented to this Court in the case of *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. Ed. 848 (1924). In *Davis, id.*, a shipper had requested a rail carrier to provide an auxiliary transportation service for which there was no provision in the carrier's tariffs. The carrier did not provide the requested service and the shipper was damaged thereby. The Court, in *Davis, id*, at 264 U. S. 562, citing *Chicago and Alton R. Co.* v. *Kirby, supra*, held that:

> "The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery."

The Court, in *Davis, id.*, went on to note that it was not necessary to demonstrate that a preference had resulted in fact, but that the assumption by a carrier of an additional obligation was necessarily a preference.

The Wisconsin Supreme Court had occasion to consider this issue in a case which is factually almost identical to the instant one. The case, *Northern Wisconsin P. Co.* v. *Chicago & N. W. Ry. Co.*, 234 N. W. 726, involved a shipment of produce. The bill of lading for the shipment was marked "carriers protective service". However, the delivering carrier did not offer protective service for the type of shipment involved and its published tariffs did not provide for the rendering of any such service.

Consequently, no protective service was given the shipment by the delivering carrier, which resulted in the shipment arriving at its destination in a frozen condition. The Wisconsin Supreme Court absolved the defendant carrier in that case from any liability for damage to the shipment, stating:

> "It seems clear that under the Interstate Commerce Act the respondent not only was not obligated to furnish heat for the shipment further than Milwaukee, but that it was under an obligation not to do so because the tariffs filed do not call for such service, and the Act forbids as discriminatory any service not included in the published tariffs . . . . it is clear, in view of the foregoing, that the agreement in the bill of lading, even though it may be construed to evidence the parties' intention that the shipment be protected, is void and of no effect. It follows, if this be true, that a finding of negligence cannot be predicated upon a failure to furnish a service which it would be illegal to furnish." *Northern Wisconsin P. Co.* v. *Chicago & N. W. Ry. Co., supra*, page 728.

It is particularly significant to note that the decision of the Wisconsin Supreme Court in *Northern Wisconsin P. Co.* v. *Chicago & N. W. Ry. Co., supra*, was cited with approval by the Seventh Circuit in *Atchison, T. & S. F. Ry. Co.* v. *Springer*, 172 F. 2d 346 (7th Cir., 1949), a case in which a shipper sought to recover damages from a carrier because of the carrier's failure to render an ancillary transportation service in a manner not provided for in that carrier's published tariffs. The Seventh Circuit held, at 172 F. 2d 349:

> "Appellee was required in the first instance to make a request to the appellant which it could lawfully perform. The railroad itself could neither intentionally nor inadvertantly, through waiver or negligence, accept and perform a request which was not warranted by an applicable tariff and was inherently preferential or otherwise discriminatory."

The Seventh Circuit went on, at 172 F. 2d 350 and 351, to make specific references to the decisions in *Davis* v. *Cornwell, supra*, and *Chicago and Alton Ry. Co.* v. *Kirby, supra*, affirming

the proposition that a shipper may not recover damages for a carrier's failure to render services not provided for in its published tariffs and that the paramount requirement of strict compliance with the tariff provisions presents an insuperable obstacle to recovery.

The very same issue was presented to the United States Court of Appeals for the Tenth Circuit in the case of *Atchison T. & S. F. Ry. Co.* v. *Bouziden*, 307 F. 2d 230 (10th Cir., 1962). The Tenth Circuit ruling was indentical to that of the Seventh Circuit in *Springer, supra,* which it cited as authority for its decision, at 307 F. 2d 233, 234.

It is simply beyond dispute that a common carrier, such as petitioner herein, can provide only those transportation services for which it has a corresponding tariff published in the schedule of tariffs which it has filed with the Interstate Commerce Commission, and that a carrier may not be held to be negligent, regardless of what may have been contemplated by the parties to the contract of carriage, for the failure to provide such a service. The Court of Appeals has completely disregarded this law. It has held that petitioner was negligent for failure to provide adequate facilities to transport the subject shipment. There is no question but that the only facilities which would have rendered the subject shipment free from damage at the time of year it was tendered for delivery to the consignee would have been a temperature controlled, protective service such as not contemplated by petitioner's tariffs. If the shipment had been tendered to petitioner during the spring, summer or fall no harm would have befallen it.

The Court of Appeals also erroneously concluded that petitioner was negligent because it was imputed to have knowledge that wine would freeze if subjected to the temperatures encountered at Chicago, Illinois and Rockford, Illinois between December 23rd and 26th, 1974 for the length of time required to make delivery. The record does not support such a conclusion. The District Court found that the damage to the subject shipment of wine resulted from the natural tendency of the wine

to freeze at temperatures of 17° Fahrenheit if exposed for a period of 24 hours or at 27° Fahrenheit if exposed for a period of 72 hours, but that these facts were not matters of common knowledge. They were proved by the testimony of plaintiff's witnesses, and defendant cannot be held to knowledge thereof (A-17). The stipulation of facts contained in the final pre-trial order reflects that at no time did the shipper request petitioner, or any other carrier, to provide any service to protect the wine from freezing or cold temperatures, or otherwise indicate that the wine required such protection. Further, respondent's counsel interrogated petitioner's district manager at great length as to his knowledge of the freezable nature of wine. The testimony was:

> "Q. Are you familiar with the consequences of freezing of wine?
>
> A. No.
>
> Q. Are you familiar with the consequences of freezing of liquids?
>
> A. I'm certainly no expert on it. Some liquids—I know some liquids will freeze at different temperatures, but I'm certainly not an expert on it.
>
> Q. Did either you or anybody under your direction and management ever consider rejecting this shipment at the time it was received?
>
> A. No. Had it been marked "freezable" it would never have been picked up.
>
> Q. In other words, you have been directed to—
>
> A. We should be informed on the bill of lading during freezing weather whether a shipment is freezable or not. It didn't occur to me that a wine would be freezable. As a layman, I thought it had about 18% alcohol in it." (A-19, 20.)

The only evidence offered at trial as to the freezing point of wine was by the plaintiff whose witness testified that:

> "It is general knowledge *in the trade* that wine will freeze at a temperature of 17° above Fahrenheit—above zero if it's left out for a period of 24 hours or more." (Emphasis added) (A-18.)

There is simply no basis for the Court of Appeals to impute the specialized knowledge of the qualities of wine to petitioner and then conclude on the basis of this imputation, which is completely contrary to all the evidence of record, that petitioner was negligent for failing to provide a transportation service not covered by its tariffs, which it would have been illegal for petitioner to provide. This is particularly startling in view of the fact that at least one district court, in the case of *Pilgrim Distributing Corp.* v. *Terminal Transport Co., Inc.*, 383 F. Supp. 204 (S. D. Ohio, 1974), found that the presumption by a carrier's terminal manager that the alcoholic content of wine would protect it from freezing was a thoroughly logical and reasonable assumption.

CONCLUSION

The Court of Appeals has based its reversal of the District Court's judgment upon findings that in two specific areas petitioner was negligent in handling the involved shipment of wine. First the Court of Appeals considered Courier-Newsom to be negligent because it delayed the shipment and second it considered Courier-Newsom to be negligent because it did not provide proper facilities for the handling of the shipment. Such findings have no support in the evidence or law. It was clearly demonstrated that the usual and customary transit time for a shipment such as that involved in the instant case, when picked up on a day before a holiday is that it is delivered on the day following the holiday. There is no question but that December 24th and 25th, 1974 were holidays and there is no question but that the shipment, picked up December 23rd, was delivered on December 26th, the day following the holiday. There was also no question but that the consignee of the shipment was unable to receive the shipment on December 24th or 25th and that the earliest date upon which the consignee could have

accepted the shipment was December 26th. Thus, there was no delay and certainly no unreasonable delay in the handling of this shipment. Since all that is required is that petitioner transport the shipment with reasonable dispatch, the Court of Appeals' finding on this issue is in error.

There is no question but that petitioner's tariffs do not allow for the rendering of any heated carriage. There is also no question that due to the inherent nature of wine to freeze when subjected to the temperatures that occurred for the period of time involved in this case, in the absence of a carrier providing heated carriage, it was inevitable that the wine would freeze. The cases are all clear, petitioner was prohibited by law from providing any heated carriage and petitioner may not be found negligent for failing to provide a service which it would have been illegal to provide.

As the District Court noted, in cases such as this, in light of this Court's decision in *Missouri Pacific R. Co.* v. *Elmore & Stahl*, 377 U. S. 134, 138 (1964), it is a carrier's burden if it wishes to escape liability for damage to a shipment to demonstrate both that it is free from all negligence in its handling of the shipment and also that the damage was occasioned solely by one of the five recognized exceptions to carrier liability. The District Court correctly found that petitioner met its burden as it demonstrated both that it was free from negligence and that the damage to the shipment was occasioned by its inherent nature to freeze. The Court of Appeals, of course, specifically refused to reach the issue of whether or not the damage was occasioned by the wine's inherent nature to freeze, after concluding, erroneously, that petitioner was negligent.

For the above reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOEL H. STEINER
39 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:
AXELROD, GOODMAN, STEINER
& BAZELON
39 South LaSalle Street
Chicago, Illinois 60603
312/236-9375

APPENDIX

Tit. 49 § 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or

over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed

values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided. Feb. 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c. 3591, § 7, 34 Stat. 593; Mar. 4, 1915, c. 176, § 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208.46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-2012

MARTIN IMPORTS,

Plaintiff-Appellant,

vs.

COURIER-NEWSOM EXPRESS, INC.

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 75 C 3937—PRENTICE H. MARSHALL, *Judge.*

ARGUED APRIL 10, 1978—DECIDED JUNE 30, 1978

BEFORE SWYGERT and TONE, *Circuit Judges,* and JAMESON, *Senior District Judge.**

JAMESON, *Senior District Judge.* Appellant, Martin Imports, brought this action under 49 U. S. C. § 20(11) to recover the value of 250 cases of wine which froze while in the custody of appellees Courier-Newsom Express, Inc., a motor common carrier. Following a non jury trial, the district court orally found in favor of appellant, and judgment was entered for appellant. Appellee filed a motion to alter and amend the findings of fact and conclusions of law. The court granted the motion and entered judgment in favor of appellee. We reverse.

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* The Honorable William J. Jameson, United States Senior District Judge for the District of Montana, is sitting by designation.

Factual Background

At approximately 4:30 P. M. on December 23, 1974, a driver for the appellee picked up 250 cases of wine at the facilities of appellant's agent in Chicago, Illinois, where they were loaded into an unheated truck trailer. The shipment had been stored inside at the agent's loading dock. The driver delivered the trailer to appellee's terminal between 6:15 and 6:30 P. M. He informed the terminal manager of his arrival and dropped the trailer at the dock closest to the terminal office, which is customary when a trailer contains alcoholic beverages.

The shipment remained on the trailer at appellee's terminal until approximately 2:00 A. M. on the morning of the 24th, when the trailer was picked up by another driver and driven to Rockford, Illinois, 87 miles away. The trip took about three hours, so that the shipment would have arrived in Rockford at about 5:00 A. M. No other freight was carried to Rockford on the trailer.

The driver dropped the trailer off at appellee's Rockford terminal. The terminal was closed, and no employees were there. Under their collective bargaining agreement both December 24 and 25 were nonwork days. No attempt was made to notify the consignee of the arrival of the shipment.

The trailer remained in the terminal yard, unheated, until the morning of December 26. During that period the temperature in Rockford was below freezing for the most part, ranging from 6° to 35° Fahrenheit. The shipment was tendered to the consignee on December 26. The consignee refused to accept delivery because the wine had frozen and many of the bottles had exploded. Wine after freezing has little value.

Carrier Liability

Section 20(11) of Title 49 provides that a common carrier "shall be liable" to a shipper "for any loss, damage, or injury

to [the shipper's] property caused by it . . . ." The Supreme Court has made it clear that section 20(11) "codifies the common-law rule that a carrier, though not an absolute insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by '(a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods' " *Missouri Pacific Railroad Co.* v. *Elmore & Stahl*, 377 U. S. 134, 137 (1964). In *Elmore & Stahl* the Court held that "to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon the burden of proof is upon the carrier to show *both* that it was free from negligence *and* that the damage was due to one of the excepted causes relieving the carrier of liability." *Id.* at 138 (emphasis added). Thus, once the shipper has made out a prima facie case, the law places upon the carrier a substantial double burden in order to avoid liability.

The District Court's Decision

Following the submission of evidence and oral argument, the district court ruled from the bench that appellant had made a prima facie case in proving that the wine was delivered to appellee in good condition and was in damaged condition when it was offered to the consignee. The court found further that although appellee "had sustained its burden of showing that it was free from negligence", it had not carried its additional burden of showing "that the damage here was occasioned by an inherent vice or the nature of the goods". Accordingly, on March 16, 1977, judgment was entered in favor of appellant for $2,891.15.

On August 1, 1977, the court granted appellee's motion to alter and amend the court's findings and judgment. In its memorandum decision the court found that "[t]here was no unreasonable delay in making delivery because, as plaintiff should have

anticipated when it made delivery to defendant on December 23, defendant's employees did not work on December 24 and 25 because they were holidays". As in its prior oral decision, the court concluded that appellee had not been negligent in its handling of the wine shipment. The court then concluded further, however, that the temperatures which would cause wine to freeze "were not matters of common knowledge" and the damage to the wine was caused "solely by the operation of the temperature on the wine". Therefore, the court held, appellee had carried its second burden of showing that the damage was due to one of the excepted causes relieving a carrier of liability, namely the inherent vice or nature of the commodity shipped.

Negligence

Appellant contends, *inter alia*, that the court erred in finding that appellant "should have anticipated when it made delivery to defendant on December 23, defendant's employees did not work on December 24 and 25 because they were holidays". We agree. Obviously December 25 was a holiday. We find nothing in the record, however, to show that appellant knew or should have known that under appellee's collective bargaining agreement with its employees December 24 was also a holiday. Appellant's own employees worked on December 24.

The parties stipulated that the "usual transit time from Chicago to Rockford . . . is next morning or second day delivery". Appellee's district and terminal manager testified that normally shipments from Chicago to Rockford are delivered the day after tender, except for days preceding holidays and on Fridays. In 1974 December 25th fell on Wednesday. Had the shipment been tendered on Tuesday, the 24th, appellant could not of course have anticipated delivery until the 26th. We perceive no reason, however, from the evidence presented, why appellant could not reasonably have anticipated delivery on December 24 of the shipment tendered on Monday, the 23rd.

Appellee's manager testified further that appellee knew when it accepted the shipment that it contained wine and knew that due to the collective bargaining agreement it would not be delivered the next day, as shipments tendered on Mondays normally would be. He said appellee also knew that the shipment would remain in the trailer and the trailer would be left outside until its employees returned to work on the 26th. And, after the shipment arrived in Rockford, there was no attempt to communicate with or notify the consignee of its arrival until the 26th.[1] Under these circumstances we can only conclude that appellee was negligent in failing to advise the appellant that its shipment would not be delivered according to appellee's normal schedule, due to the fact that under the collective bargaining agreement not only was Christmas day a holiday, but the preceding day as well. While the delay in delivery of the wine arguably may have been reasonable,[2] the failure to advise the shipper in advance of the abnormally long delivery time was not.

1. Appellee contends that the consignee was also closed on December 24, so that any attempt to communicate would have been futile. The record reveals that the consignee was a small family-run business. It cannot of course be determined whether it could have been reached on December 24. The crucial facts, however, are (1) appellee's acceptance of the shipment without advising appellant it would not be delivered until December 26 and (2) appellee's failure to attempt notification. In fact, appellee did not know that the consignee was not open on December 24 until the trial, when the consignee's vice president testified to that fact.

2. Appellant has also argued that appellee delayed unreasonably in dispatching the delivery from Chicago. If dispatched earlier, instead of sitting at appellee's terminal for approximately eight hours, the shipment could have arrived in Rockford before the Rockford terminal closed on the 24th. That, however, would have required the carrier to transport the shipment faster than its normal transit time, which was stipulated to be "next morning or second day delivery". Nevertheless, it is still clear that the shipment took longer than a normal shipment tendered on Monday afternoon. Once the shipper shows delay the "burden to come forward with an explanation for the delay properly belongs on the defendant". *Shippers Serv. Co.* v. *Norfolk & W. Ry.*, 528 F. 2d 56, 59 (7 Cir. 1976). Here the only explanation for the delay was the collective bargaining agreement making December 24 a holiday.

We find nothing in the record that would impute knowledge of the collective bargaining agreement to appellant. In appellant's business the day preceding Christmas is apparently among its busiest of the year. It was not unreasonable for it to assume that the carrier would also be open for business that day. It is reasonable to infer that if appellant had any reason to believe that the wine would not be delivered on the 24th according to the normal transit schedule, it would not have tendered the shipment in the first place. Wine freezes if exposed to a temperature of 17° Fahrenheit for 24 hours.[3] Since appellant, a wine merchant, well knew this propensity to freeze, it surely would not have tendered the shipment if it had anticipated that it would be left exposed to the low temperatures then extant for not only the short duration of the transit itself, but also for 48 additional hours while appellee's employees were not working.

Our conclusion that the appellee was negligent is buttressed by the express provision in appellee's tariffs for carriage of wine, which was paid by the appellant. By this tariff appellee, in effect, held itself out as capable of transporting wine. Although appellee insists that it would have been illegal for it to provide heated carriage,[4] and it did not know that wine would freeze, its tariff indicated that it had the knowledge and facilities to properly and adequately transport that commodity. This would include knowledge that wine will freeze if exposed for several days to subfreezing temperatures. Section 316(b) of Title 49

3. The district court found that the "damage to the wine resulted from the natural tendency of the wine to freeze at temperatures of 17° Fahrenheit if exposed for a period of 24 hours, or at 27° Fahrenheit if exposed for a period of 72 hours", but concluded that "these facts were not matters of common knowledge".

4. Appellee's tariffs did not provide for heated carriage and tariff provisions must be strictly adhered to. Provision of services not provided for constitutes an improper preference. See, *e.g.*, *Davis* v. *Cornwell*, 264 U. S. 560 (1924); *Atchison T. & S. F. Ry.* v. *Springer*, 172 F. 2d 346 (7 Cir. 1949). But see *Johnson Motor Transp.* v. *United States*, 149 F. Supp. 175, 179 (Ct. Cl. 1957). In any event,

(Footnote continued on next page.)

requires every motor vehicle carrier "to provide safe and adequate service, equipment, and facilities for the transportation of property . . . ." We believe the appellee failed in its duty to provide safe and adequate equipment and facilities for the transportation of this commodity—wine—which it voluntarily accepted pursuant to the terms of an express tariff.[5]

Conclusion

We conclude that the record does not sustain a finding that appellant knew or should have known that appellee's Rockford terminal would be closed on December 24. Appellee accepted the shipment knowing that it was wine, that sub-freezing temperatures would be encountered, and that there would be a delay in delivery of 48 hours in excess of the normal transit schedule. Appellee was negligent in failing to advise appellant that the wine would not be delivered until December 26—two full days after the normal time of delivery. We reverse the judgment of the district court and order that judgment be entered in favor of the appellant in the amount of $2,891.15.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

(Footnote continued from preceding page.)
it is at least arguable that there may well have been other means of protecting the wine, i.e., placing the shipment inside appellee's terminal in either Chicago or Rockford.

5. Appellant contends further that the court erred in holding that the damage was due solely to the inherent nature of the wine, since wine will not freeze with the passage of time unless it is deliberately exposed to sub-freezing temperatures. It is unnecessary to reach this question in view of our conclusion that the carrier failed to show that it was free from negligence in handling the shipment of wine.

UNITED STATES DISTRICT COURT
For The
Northern District of Illinois
Eastern Division

MARTIN IMPORTS,
Plaintiff,
vs.
COURIER-NEWSOM EXPRESS, INC.,
Defendant.

Civil Action
File No.
75 C 3937

JUDGMENT

This action came on for trial before the Court, Honorable Prentice H. Marshall, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff Martin Imports take nothing by its suit and that its action against defendant, Courier-Newsome Express, Inc., a corporation, be and it is dismissed with judgment to defendant for its costs.

Dated at Chicago, Illinois, this 1st day of August, 1977.

/s/ H. STUART CUNNINGHAM
Clerk of Court

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Prentice H. Marshall.

Cause No. 75 C 3937 Date August 1, 1977

Title of Cause—Martin Imports v. Courier-Newsom Express, Inc.

Brief Statement of Motion—Judgment Order.

Enter Judgment Order. It is ordered and adjudged that plaintiff Martin Imports take nothing by its suit and that its action against defendant, Courier-Newsom Express, Inc., a corporation, be and it is dismissed with judgment to defendant for its costs.

(Draft. See Judgment Order attached.)

Marshall, J.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division.

MARTIN IMPORTS,
Plaintiff,
vs.
COURIER-NEWSOM EXPRESS, INC.,
Defendant.
No. 75 C 3937

JUDGMENT ORDER.

This cause came on for trial before the court without a jury on plaintiff's complaint and defendant's answer thereto. For the reasons stated in the Memorandum Decision filed this date which will stand as the court's findings of fact and conclusions of law pursuant to Rule 52(a), *Fed. R. Civ. P.*,

It is ordered and adjudged that plaintiff Martin Imports take nothing by its suit and that its action against defendant, Courier-Newsom Express, Inc., a corporation, be and it is dismissed with judgment to defendant for its costs.

Dated: August 1, 1977

Enter:

/s/ Prentice H. Marshall
Prentice H. Marshall
Judge

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Prentice H. Marshall

Cause No. 75 C 3937 Date August 1, 1977

Title of Cause—Martin Imports v. Courier-Newsom Express, Inc.

Brief Statement of Motion—Order.

For the reasons stated in the attached Memorandum Decision, defendant's motion to amend and alter findings of fact, conclusions of law and judgment is granted and judgment will enter in favor of defendant and against plaintiff.

(Draft. See Memorandum Decision attached.)

Marshall, J.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MARTIN IMPORTS,
Plaintiff,
vs.
COURIER-NEWSOM EXPRESS, INC.,
Defendant.
No. 75 C 3937

MEMORANDUM DECISION

This is an action under the Interstate Commerce Act, 49 U. S. C. § 20(11), with jurisdiction under 28 U. S. C. § 1337, in which plaintiff seeks to recover for damages to a shipment of wine which it made from Chicago, Illinois to Rockford, Illinois via defendant Courier-Newsom Express, Inc., a motor carrier subject to the Act. On March 16, 1977, following a trial without a jury, we orally decided the case in favor of the plaintiff and against the defendant. Thereafter, defendant timely moved that we alter our findings and judgment and find the issues in favor of the defendant. We have concluded that defendant's motion is well founded. The following will stand as our amended findings of fact and conclusions of law pursuant to Rule 52(a), *Fed. R. Civ. P.*

The wine was in good condition when it was delivered to defendant by plaintiff on December 23, 1974; it was in damaged condition because it had frozen when it was delivered to plaintiff's consignee in Rockford on December 26, 1974. There was no unreasonable delay in making delivery because, as plaintiff should have anticipated when it made delivery to defendant on December 23, defendant's employees did not work on December 24 and 25 because they were holidays. Furthermore, plain-

tiff's consignee was not open for business on December 24 or 25. Accordingly, the earliest date the delivery could have been made was December 26.

Under its tariffs, defendant could not provide heated cartage. Accordingly, the shipment of wine remained in defendant's unheated truck in its yard in Rockford where, during the period in question, the temperature ranged from a high of 35° to a low of 6°.

Under Section 20(11) of the Act, and the Supreme Court's decision in *Missouri Pacific R. R. Co.* v. *Elmore & Stahl*, 377 U. S. 134, 138 (1964),

> . . . in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability.

The Court proceeded to list the five excepted causes which are recognized under § 20(11) of the Act: (1) an act of God, (2) the public enemy, (3) the act of the shipper himself, (4) public authority, or (5) the inherent vice or nature of the goods. 377 U. S. at 137.

Defendant has sustained its burden with respect to proof of non-negligence. The evidence shows that it properly handled the wine; kept it under cover; delivered it timely; and in view of the fact that its tariffs did not permit it to provide heated cartage, it was not negligent in failing to provide heat.

As we read *Elmore & Stahl, supra,* the burden on defendant is, however, a conjunctive one. Thus it must show that "it was free from negligence *and* that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability." Id. at 138. (Emphasis supplied)

Certainly the case does not involve an act of God, the public enemy or public authority. Nor, in our opinion, has defendant

proved that the damage to goods was caused by an act of the shipper. There remains for consideration whether defendant has shown that the goods were damaged because of an inherent vice or nature of the goods.

In *Elmore & Stahl* a jury had found that the cause of the damage to the melons there was not an inherent vice in the goods. We find to the contrary here. Upon reconsideration of the evidence, we find that the damage to the wine resulted from the natural tendency of the wine to freeze at temperatures of 17° Fahrenheit if exposed for a period of 24 hours, or at 27° Fahrenheit if exposed for a period of 72 hours. But these facts were not matters of common knowledge. They were proved by the testimony of plaintiff's witnesses. Defendant cannot be held to the knowledge thereof. On the facts disclosed by the record, the damage occurred solely by the operation of the temperature on the wine. In these circumstances, defendant has sustained its burden of proof. *Hamilton Mfg. Co.* v. *Chicago & Northwestern Rwy. Co.*, 277 F. 2d 652 (7th Cir. 1960); *Joseph Miller Co.* v. *Gateway City Transfer Co.*, 247 Wis. 584 (1945); *United States* v. *Reading Co.*, 184 F. Supp. 206 (E. D. Pa. 1960), *aff'd* 289 F. 2d 7 (3d Cir. 1961).

Accordingly, judgment will enter in favor of defendant and against plaintiff.

Enter:

/s/ PRENTICE H. MARSHALL
Prentice H. Marshall
Judge

Dated: August 1, 1977.

Zimmerman—Direct

Q. Are you familiar with the alcohol content that the wine in this shipment consisted of?

A. Yes, I am.

Q. What is that alcohol content?

A. Between 8 and 10 percent.

Q. Do you know what the freezing point would be of wine having such an alcohol content?

Mr. Steiner: I object, your Honor, no foundation as to the witness' qualifications in this regard.

Mr. Gill: Your Honor, I think that the Federal Rules of Evidence clearly state that a lay person can testify as to circumstances that are within his knowledge and experience.

He doesn't have to be a member of any particular profession.

Mr. Steiner: Again, there has been no foundation as to his experience in this regard.

Mr. Gill: He's testified he's been working in the distilled spirits industry for over 15 years.

He's handled wine before, he knows the difference between wines, and he knows the alcoholic content of wine in this particular shipment.

The Court: Overruled. He may answer.

By the Witness:

A. It's general knowledge in the trade that wine will freeze at a temperature of 17 degrees above Fahrenheit—above zero if it's left out for a period of 24 hours or more.

(Tr. pp. 17-18, March 9, 1977)

Edmunds—Direct

Q. Would that be the date on which you picked the shipment up?

A. Yes, sir.

Q. Do you remember what time of the day it was on?

A. It was late in the afternoon, somewhere between 4:00, 4:30.

(Tr. p. 40, March 9, 1977)

O'Hearn—Direct

A. The shipment remained on 2655. It was never transferred off of that trailer. The second shipment that Mr. Edmunds picked up was removed from the trailer because the destination was not Rockford on that shipment.

And the trailer remained in that door and was subsequently sealed into that trailer, matched with another trailer. It was on a 27-foot trailer which moves in what we call double bottoms, two trailers pulled in tandem.

It moved out that night at—around between 1:00 and 2:00 a.m. On the morning of the 24th it went to Rockford. There was no other freight on that trailer.

(Tr. p. 62, March 9, 1977)

O'Hearn—Direct

Q. Are you familiar with the consequences of freezing of wine?

A. No.

Q. Are you familiar with the consequences of freezing of liquids?

A. I am certainly no expert on it. Some liquids—I know some liquids will freeze at different temperatures, but I am certainly not an expert on it.

Q. Did either you or anybody under your direction and management ever consider rejecting this shipment at the time it was received?

A. No. Had it been marked "freezable" it would never have been picked up.

Q. In other words, you have been directed to—

A. We should be informed on the bill of lading during freezing weather whether a shipment is freezable or not. It didn't

occur to me that a wine would be freezable. As a layman I thought it had about 18 percent alcohol in it.

(Tr. pp. 66-67, March 9, 1977)

O'Hearn—Direct

Q. Can you tell me, sir, what would the normal transit time be on a shipment of the size that we have been talking about here from Chicago, Illinois, to Rockford?

A. Normally, transit time during the week, a shipment picked up on Monday would normally deliver on Tuesday, Tuesday or Wednesday.

When you come into a weekend, a shipment picked up on Friday we would deliver on Monday.

Q. Why would a shipment picked up on Friday deliver on Monday?

A. Because the terminal is closed Saturday and Sunday, the same conditions that existed in this case, except it happened to be two holidays.

Q. Okay. I take it then that what you are—what you are telling us is that if you pick up a shipment on the day before a holiday, you cannot deliver until the day after the holiday.

A. That is correct.

Q. And that is because the terminal is closed and there are no personnel to deliver it?

A. Exactly.

Q. Now, Courier-Newsom is—is Courier-Newsom a party to a number of collective bargaining agreements with the Teamsters Union?

A. Yes.

Q. And are city drivers and over-the-road drivers covered by the same collective bargaining agreement?

A. No, not in every case. The same master agreement, but there are different books on the road driver and the city driver, it's different jurisdictions.

Q. Are there any terms and conditions in collective bargaining agreements which you are aware of relating to a city—excuse me, an over-the-road driver making a local city delivery?

A. Yes, it's precluded. The local driver has jurisdiction, and if a road driver were to make a delivery within that jurisdiction we would be liable for a time claim from the city driver for that amount of time in a grievance, so it's just not done.

Q. Now, I believe you have already described the procedures for deliveries to Rockford, how trailers are dropped there.

Would you tell me in your experience in the transportation business, whether or not you would conside the transit time involved in the handling of the shipment which is the subject of this suit to have involved any delay?

A. None whatsoever.

Q. Can you tell me if there would be any manner in which this shipment could have been transported to destination any quicker than it was?

A. Oh, there is always a way, and the way is for a shipper to request exclusive use of vehicle, request a holiday delivery for which the charges are double or more than what's normally paid for the shipment.

In the case of a 9,000 pound shipment it might involve considerably more than double.

Q. And is this something that is done only upon a shipper request?

A. Yes.

Q. Are there specific provisions for the providing of this type of service—

A. Yes, the tariffs have the provisions.

Q. And do the tariffs require—

The Court: Excuse me just a minute.

By Mr. Steiner:

Q. Do the tariffs require a shipper or consignee, for that matter, to request this type of service, specifically make a request for this type of service before this is provided?

A. Not only specifically request it but write it on the bill of lading and indicate the authority for the service.

Q. By "indicate the authority for the service," could you tell me—

A. The individual who ordered it. In this case Alltransport was the forwarder involved and they would have had to indicate on the bill of lading that they wished exclusive use of trailer, holiday delivery.

Q. Okay. Now, you have previously examined Exhibit 3, which is the bill of lading for this shipment, have you not?

A. Yes.

Q. Did you observe any such request or notation on that bill of lading?

A. No, sir.

(Tr. pp. 74-78, March 9, 1977)

Jaenicke—Cross

Q. Your company's just a wholesale distributor of liquor; is that correct?

A. Wines and liquors, yes.

Q. Right. Does your company have warehouse employees?

A. Yes, sir.

Q. And do you have a man down in the receiving dock?

A. That is right.

Q. And the facilities where this was delivered, this was a warehouse; is that correct?

A. Yes.

Q. Are you—your employees union members?

A. They are.

Q. And your company has a collective bargaining agreement with the union for these employees?

A. Yes, sir.

Mr. Gill: Your Honor, I think this goes beyond the scope of direct.

The Court: He's here, let him examine him. Overruled.

By Mr. Steiner:

Q. Could you tell me what is the name of the union which you have a collective bargaining agreement with?

A. It's the Teamsters Union.

Q. Teamsters Union.

And Christmas Day is a holiday pursuant to the Teamsters collective bargaining agreement?

A. That is correct.

Q. So your place of business was closed on Christmas Day of 1974?

A. That is right.

Q. And pursuant to the Teamsters collective bargaining agreement, December 24, 1974 is a holiday also; wasn't it?

A. That is right.

Q. And your place of business was closed December 24, 1974?

A. That is right.

Q. There was no one there to receive the shipment on December 24?

A. That is right.

(Tr. pp. 10-12, March 16, 1977)